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14
15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 SAN JOSE DIVISION

18 13 MICHAEL ZELENY, an individual,

14 Plaintiff,
15
16 v.
17

18 17 **EDMUND G. BROWN, JR., an individual,
19 in his official capacity; XAVIER
BECERRA, an individual, in his official
capacity; CITY OF MENLO PARK, a
municipal corporation; and DAVE
BERTINI, in his official capacity,**

20 20 Defendants.
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No. 3:17-cv-07357 RS (NC)

**DEFENDANT XAVIER BECERRA'S
OPPOSITION TO PLAINTIFFS'
MOTION TO MAKE CLARIFYING
AMENDMENT TO SECOND AMENDED
COMPLAINT**

Date: October 29, 2020
Time: 1:30 p.m.
Dept: 3, 17th Floor
Judge: The Honorable Richard G.
Seeborg
Trial Date: Not Set
Action Filed: 12/28/2017

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1 After two years, three complaints, the expiration of the fact discovery cut-off, and looming
 2 expert and dispositive-motion cutoffs, Plaintiff Michael Zeleny seeks to amend his complaint to
 3 add a claim of facial unconstitutionality that could have been known to Zeleny the day he filed his
 4 original complaint. Defendant California Attorney General Xavier Becerra requests that the
 5 Court deny the motion.

6 **I. ZELENY'S NEW CAUSE OF ACTION IS NOT ENCOMPASSED WITHIN HIS EXISTING
 7 COMPLAINT**

8 Zeleny seeks to assert a new cause of action against Attorney General Becerra: a vagueness
 9 claim under the Due Process Clause of the Fourteenth Amendment.

10 Zeleny argues that a vagueness claim is embedded in his existing “Fourteenth Amendment”
 11 claim. *See Mot.* at 2. But the current complaint’s “Fourteenth Amendment” claim is brought
 12 under the Equal Protection Clause, not the Due Process Clause, of the Fourteenth Amendment.
 13 *See Second. Am. Compl.*, ¶¶ 225-29.

14 Indeed, elsewhere in the complaint, Zeleny alleges that *Menlo Park*’s municipal policies
 15 “are void as unconstitutionally vague, in that the prohibitive terms are not clearly defined such
 16 that a person of ordinary intelligence can readily identify the applicable standard for inclusion and
 17 exclusion.” *Second Am. Compl.*, ¶ 214. Zeleny was clearly aware that a vagueness claim against
 18 state and local laws might exist. But he elected not to assert such a claim against California’s
 19 open carry statutes until after discovery closed, and after the Attorney General had an opportunity
 20 to prepare a defense to such a claim.

21 **II. LEAVE TO AMEND THE COMPLAINT SHOULD BE DENIED**

22 The four reasons for denying leave to amend are “(1) bad faith on the part of the plaintiffs;
 23 (2) undue delay; (3) prejudice to the opposing party; and (4) futility of the proposed amendment.”
 24 *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). “Undue
 25 delay by itself, however, is insufficient to justify denying a motion to amend.” *Bowles v. Reade*,
 26 198 F.3d 752, 758 (9th Cir. 1999).

1 **A. Bad Faith and Undue Delay**

2 As part of his long-running dispute with the City of Menlo Park, Zeleny has been in contact
 3 with California's open carry laws, and the exceptions to those laws, for years. *See, e.g.*, Second
 4 Am. Compl., ¶¶ 99 ("Zeleny argued that he fell within an exception to the firearms statutes
 5 because he was taking part in an entertainment event or video production") 121 ("Contrary to the
 6 plain language of the Penal Code, however, the City has interpreted it to require authorization
 7 from the City both for the video production itself, and for the carrying of unloaded firearms as
 8 part of that production.") The relevant laws have not been changed since 2012, and the
 9 interpretation of the "authorized participant" exception appears to have been a core dispute
 10 between Zeleny and the City leading up to this complaint. If Zeleny was unclear about what
 11 California's open carry laws prohibited and what they permitted, he had ample opportunity to
 12 plead such a claim before now.

13 Zeleny attempts to pin the fault for his own delay on the Attorney General declining to
 14 provide certain discovery responses (which the Attorney General has now provided). But the
 15 Attorney General does not write California's laws, and the Attorney General never applied the
 16 open carry laws in any way to Zeleny. To the extent that Zeleny forbore from demonstrating
 17 because he was uncertain about what California law meant and how the City of Menlo Park
 18 would apply it to him, that uncertainty was known to Zeleny when he filed his complaint. He did
 19 not learn any new facts during discovery that might have created uncertainty.

20 **B. Prejudice to the Attorney General**

21 The motion should also be denied because Defendant Becerra will have no opportunity to
 22 test the validity of the new claim against him. The Court has already ordered that "[n]o further
 23 requests to extend case deadlines will be granted." *See* Dkt. No. 139. By the time the Court
 24 considers this motion, the fact discovery cut-off will have passed (October 2), as will the cut-off
 25 for expert disclosures (October 9). *Id.* The expert discovery cut-off is November 20, and
 26 dispositive motions will need to be filed around the New Year to be heard before the operative
 27 cut-off of February 25. *Id.*

1 While a facial constitutional challenge generally involves questions of law, a due process
2 vagueness claim may also depend on facts about what conduct a plaintiff is engaged in, or wants
3 to engage in, to see if plaintiff's conduct is covered by the law. And even if no facts were needed,
4 it would be prejudicial to all Defendants to conduct research and brief a new legal issue on
5 minimal notice.

6 **III. CONCLUSION**

7 For these reasons, Defendant Becerra requests that the motion to amend the complaint
8 should be denied.

9
10 Dated: October 8, 2020

Respectfully Submitted,

11 XAVIER BECERRA
12 Attorney General of California
13 ANTHONY R. HAKL
14 Supervising Deputy Attorney General

15 */s/ John W. Killeen*
16 JOHN W. KILLEEN
17 Deputy Attorney General
18 Attorneys for Defendants

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CERTIFICATE OF SERVICE

Case Name: Zeleny, Michael G. No. 3:17-cv-07357 RS (NC)
Brown, et al.

I hereby certify that on October 8, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT GAVIN NEWSOM'S OPPOSITION TO PLAINTIFFS' MOTION TO
MAKE CLARIFYING AMENDMENT TO SECOND AMENDED COMPLAINT**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 8, 2020, at Sacramento, California.

Tracie L. Campbell

Declarant

/s/ *Tracie Campbell*

Signature

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